

A Datuk Bandar Kuala Lumpur v Pembinaan RT Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
W-01-610-10 OF 2011

B RAMLY ALI, ABD WAHAB PATAIL AND ANANTHAM KASINATHER
JJCA
10 SEPTEMBER 2012

C *Civil Procedure — Striking out — Writ and statement of claim — Whether claim so obviously unsustainable it deserved to be struck out — Whether argument action should have been brought by way of judicial review and not by way of writ baseless*

D The respondent had sued the appellant in the High Court for fraudulently misrepresenting that the former's proposed development of a piece of land could not take place because the land had been designated for the purpose of 'park and recreation'. The respondent claimed the misrepresentation was only made after five years of talks had taken place between the parties over the proposed development during which time layout plans were drawn up, relevant agreements were drafted and even a letter of intent was issued by the appellant to the respondent. Thirteen years later, the respondent discovered the land had been used for a hotel and a school. In its action against the appellant, the respondent sought a declaration that a contract/agreement had existed between the parties which the appellant had breached causing the respondent to suffer damages. The respondent contended the appellant had committed a breach of contract as it had fraudulently concealed the fact that the respondent's proposed development of the land was rendered impossible of performance due to the designated purpose of the land. The appellant applied to strike out the action under O 18 r 19(1)(a), (b) and (d) of the Rules of the High Court 1980 ('RHC') on the grounds, inter alia, the respondent's claim was time barred under the Limitation Act 1953 and/or the Public Authorities Protection Act 1948 and that the claim should not have been brought by way of writ but by way of judicial review under O 53 of the RHC. The High Court dismissed the application holding the claim was not frivolous, scandalous or an abuse of process and that there were triable issues.

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Held, dismissing the appeal with costs:

- I** (1) The statement of claim disclosed a reasonable cause of action. The issues as to the existence of the alleged contract/agreement and the element of deceit as claimed by the respondents were prima facie triable issues. The mere fact the action was unlikely to succeed at trial was no ground for striking it out (see paras 11 & 15(a)).
- (2) The appellant's denial of the facts alleged in the statement of claim was

insufficient for the purpose of striking out the claim. Both parties had to be given a chance to adduce relevant evidence at trial to support their respective claim and denial (see para 15(b)).

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- (3) The appellant's argument that the action should have been brought by way of judicial review was baseless. The issues of fraudulent misrepresentation, concealment and deceit raised in the claim could only be instituted by way of writ action (see para 14).

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[Bahasa Malaysia summary]

Responden telah menyaman perayu di Mahkamah Tinggi untuk misrepresentasi salah nyata bahawa cadangan pembangunan sebidang tanah responden tidak dapat dijalankan kerana tanah tersebut telah ditetapkan bagi tujuan 'taman dan rekreasi'. Responden mendakwa salah nyata tersebut hanya dibuat selepas lima tahun perbincangan telah dijalankan di antara pihak-pihak ke atas pembangunan yang dicadangkan di mana pelan susun atur masa telah disediakan, perjanjian-perjanjian relevan telah didraf dan juga surat niat dikeluarkan oleh perayu kepada responden. Tiga belas tahun kemudian, responden mendapati tanah tersebut telah dibangunkan untuk hotel dan sekolah. Dalam tindakannya terhadap perayu, responden memohon perisytiharan bahawa kontrak/perjanjian telah wujud di antara kedua-dua pihak yang mana perayu telah memungkiri menyebabkan responden mengalami kerugian. Responden berhujah perayu telah melakukan kemungkiran kontrak kerana ia telah menipu dengan menyembunyikan fakta bahawa cadangan pembangunan tanah responden tersebut adalah mustahil untuk dilaksanakan akibat tujuan yang ditetapkan terhadap tanah tersebut. Perayu memohon untuk membatalkan tindakan di bawah A 18 k 19(1)(a), (b) dan (d) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') atas alasan, antara lain, tuntutan responden adalah dihalang masa di bawah Akta Had Masa 1953 dan/atau Akta Perlindungan Pihak Berkuasa Awam 1948 dan bahawa tuntutan tersebut tidak patut dituntut melalui writ tetapi melalui semakan kehakiman di bawah A 53 KMT. Mahkamah Tinggi menolak permohonan memutuskan tuntutan tersebut tidak remeh, menyusahkan atau penyalahgunaan proses mahkamah dan bahawa terdapat isu-isu yang boleh dibicara.

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Diputuskan, menolak rayuan dengan kos:

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- (1) Penyataan tuntutan mengemukakan kausa tindakan yang munasabah. Isu mengenai kewujudan kontrak/perjanjian yang didakwa dan unsur penipuan seperti yang didakwa oleh responden-responden adalah isu-isu boleh dibicara prima facie. Hakikat tindakan tidak mungkin berjaya pada perbicaraan bukan alasan untuk membatalkannya (lihat perenggan 11 & 15(a)).
- (2) Penafian perayu terhadap fakta yang didakwa di dalam penyataan tuntutan tidak mencukupi untuk tujuan membatalkan tuntutan

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A tersebut. Kedua-dua pihak perlu diberi peluang untuk mengemukakan keterangan relevan pada perbicaraan untuk menyokong tuntutan dan penafian mereka masing masing (lihat perenggan 15(b)).

B (3) Hujahan perayu bahawa tindakan patut dilaksanakan melalui semakan kehakiman adalah tidak berasas. Isu-isu misrepresentasi salah nyata, penyembunyian dan penipuan yang dibangkitkan di dalam tuntutan hanya boleh dimulakan melalui writ tindakan (lihat perenggan 14).]

Notes

C For cases on writ and statement claim, see 2(4) *Mallal's Digest* (4th Ed,2012 Reissue) paras 8171–8176.

Legislation referred to

Limitation Act 1963

D Public Authorities Protection Act 1948

Rules of the High Court 1980 O 18 r 19, 19(1)(a), (b), (d), O 53

Appeal From: Civil Suit No S21–169 of 2010 (High Court, Kuala Lumpur)

E *Ramesh Abraham (Janice Lee and Jason Gopal with him) (Shook Lin & Bok) for the appellant.*
Foo Joon Liang (Ang Kok Chun with him) (Gan Partners) for the respondent.

Ramly Ali JCA (delivering judgment of the court):

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[1] The present appeal is against the decision of the learned High Court judge dated 22 September 2011 dismissing the appellant's application to strike out the respondent's writ and statement of claim under O 18 r 19 of the Rules of the High Court 1980 ('RHC').

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THE RESPONDENT/PLAINTIFF'S CLAIM

H [2] In the statement of claim the respondent/plaintiff ('Pembinaan RT Sdn Bhd') claimed that they had intended to develop a piece of land which had yet to be alienated for that purpose. There were numerous discussions held between the respondent and the appellant ('DBKL') since 1989. Such discussions were continuous until 1994 and various steps including drawing of layout plans for the said proposed development as well as the relevant agreements were prepared and drafted. Ultimately a letter of intent dated 4 January 1991 was issued to the respondent by the appellant.

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[3] However, by a letter dated 30 August 1994 the appellant informed the respondent that the contract/agreement has become frustrated due to the fact

that the proposed development on the said land was totally against the original purpose of the usage of the land ie for park and recreation. A

[4] In September 2007 the respondent found out that the particular land had been permitted to be used for a hotel and a school, which the respondent claimed were not in conformity with the original usage of 'park and recreation'. B Had the respondent known that the said land could in fact be converted for use other than for 'park and recreation' the respondent was more than willing to proceed with the contract.

[5] Hence, the respondent filed the present suit, seeking for declarations that: C

- (a) a contract/agreement exist between the appellant and the respondent;
- (b) the appellant had breached the said contract/agreement; and
- (c) such breach had caused the respondent to suffer damages. D

[6] The respondent contended that the appellant had fraudulently concealed the fact that the development of the respondent's project was not impossible by reason of the designated purpose of the land; and in the absence of such impossibility, the appellant was in breach of the contract. E

[7] The appellant however applied to strike out the respondent's writ and statement of claim under O 18 r 19(1)(a), (b) and (d) of the RHC 1980, on the grounds, inter alia, that: F

- (a) the respondent's claim is barred by the provision of the Limitation Act 1953 and/or the Public Authorities Protection Act 1948; and
- (b) the respondent's claim should have been properly instituted by way of a judicial review under O 53 of the RHC 1980, and not by way of a writ action. G

[8] The learned High Court judge dismissed the appellant's said application on the ground that the statement of claim and the cause of action could not be said to be baseless or obviously unsustainable. The learned judge also found that the respondent's claim against the appellant which is founded on breach of contract and tort of deceit could not be said to be frivolous or scandalous or amounts to an abuse of process. The learned judge was of the view that the respondent's statement of claim has raised triable issues that ought to go for trial, but not to be struck out. H I

OUR FINDINGS

[9] From the statement of claim and the prayers thereof, we find that the

- A respondent's claim against the appellant is founded on breach of contract/agreement and the tort of deceit. The statement of claim has prayed for a declaration that a contract exists between the parties wherein 'it has been agreed that the plaintiff (the respondent) is appointed to execute and complete the project' in question; a declaration that the defendant (the appellant) had
- B breached the said contract; and a declaration that the appellant's breach has caused the respondent to suffer general and special damages.

- [10] A scrutiny of the statement of claim also reveals that the respondent claimed that it was deceived by the appellant in that on the one hand the
- C appellant informed the respondent that the respondent's proposed development contravened the designation of the land for the purpose of 'park and recreation', yet on the other hand, in 2007, the appellant permitted the use of the land for a hotel and a school.

- D [11] The issues as to the existence of the alleged contract/agreement and the element of deceit as claimed by the respondents are prima facie triable issues, which need to go for trial, to enable the respondent to adduce relevant evidence to prove its claim.

- E [12] On the issue of limitation, as raised by the appellant, the appellant argued that the cause of action (if any) arose on 30 August 1994, ie the date when the purported breach occurred. The respondent on the other hand contended that the limitation period only started to run from the date the
- F respondent learnt that the said land had been approved for a hotel and a school, in September 2007. Since the writ was filed on 28 June 2010, the respondent claimed that the action was well within the limitation period of six years.

[13] This is also a triable issue, which need for trial for evidence to be adduced and parties to submit at a greater length.

- G [14] Paragraphs 1–59 of the statement of claim talk about the existence of a contract/agreement between the parties. The appellant denied the existence of the contract. Paragraphs 63 and 72 of the statement of claim also talk on other causes of action on fraudulent misrepresentation, concealment, and deceit.
- H That being the case of respondent is entitled to bring an action against the appellant by way of a writ action. The appellant's argument that the respondent should file the action by way of judicial review is therefore baseless and devoid of merit. All the issues of misrepresentation, concealment and deceit can only be instituted by way or writ action and be determined at trial of the case.

I CONCLUSION

[15] On the above considerations, we are of the view that:

- (a) the statement of claim discloses reasonable cause of action and raises

some questions fit to be decided by a judge and; the mere fact that it is unlikely to succeed at trial is no ground for striking out;

- (b) at this stage of the proceedings, the appellant cannot base its grounds for striking out on allegation that the facts in the statement of claim are untrue. The appellant's denial of the facts as alleged in the statement of claim is insufficient for the purpose of striking out the claim; both parties must be given chance to adduce relevant evidence at trial to support their respective claim and denial;
- (c) the appellant had failed to establish their case under O 18 r 19(1)(a), (b) and (d) of the RHC 1980,. The appellant had failed to show that the respondent's claim against it was obviously unsustainable, vexatious, frivolous, scandalous or an abuse of the process; and
- (d) the learned High Court judge had considered all the relevant considerations and applied the correct principles of law; and had correctly come to his decision on the matter before him. We therefore find no reason to interfere.

[16] In the premise, we unanimously dismiss the appeal with costs of RM5,000 to the respondent and the matter should proceed to go for trial at the High Court.

Appeal dismissed with costs.

Reported by Ashok Kumar

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